FILE COPY

FILED
SEP 1
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,

v.

THE UNITED STATES OF
AMERICA

Brief for Petitioners

JOHN M. PERRY,
AUGUSTUS BENNERS,
JOHN W. DRYE, JR.,
Counsel for Petitioners.

INDEX

	PAGE
Opinions of the Courts below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Specification of Error to be urged	8
Argument:	
(1) The claim for deficiency of taxes was abated and the bond became of no effect in accordance with its terms prior to the institution of this action	8
(2) The decision of this Court in the John Barth Company case, relied upon by the Court below, is not in point	13

Authorities Cited:

Almeda Park Co. v. Lucas, 37 Fed. (2nd) 805	12
Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. 346	6, 10, 12
Graham v. Dupont, 262 U. S. 234, 258	11
Gulf States Steel Co. v. Commissioner, 12 B. T. A. 1244, 1251	6
National Refining Company, Appeal of, 1 B. T. A. 236	11
United States v. Alexander, 110 U. S. 325	10
United States v. John Barth Company, 279 U. S. 370	13
United States v. Martin Hotel Company, 52 Fed. (2nd) 161, 163	16

Statutes Cited:

Sec. 240(a)	Judicial Code as amended	1
Sec. 279(a)	Revenue Act of 1924	3, 4, 9
Sec. 279(b)	Revenue Act of 1924	3, 4
Sec. 906(e)	Revenue Act of 1924 as amended	3, 9, 11
Sec. 907(a)	Revenue Act of 1924 as amended	17
Sec. 274(a)	Revenue Act of 1926	2
Sec. 274(b)	Revenue Act of 1926	3, 11
Sec. 279(f)	Revenue Act of 1926	4, 9
Sec. 283(e)	Revenue Act of 1926	2
Sec. 1105	Revenue Act of 1926	2
Sec. 273(f)	Revenue Act of 1928	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF
AMERICA

BRIEF FOR PETITIONERS

Opinions of the Courts Below

The District Court rendered no formal opinion in the case. The opinion of the Circuit Court of Appeals was announced on February 19, 1932, 56 Fed. (2d) 43. It appears at page 109, and Judge Sibley's dissenting opinion at page 115 of the record.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on February 19, 1932 (R.119).

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925 (Ch. 229, 43 St. 936). The petition for certiorari was filed March 23, 1932, and was granted April 25, 1932.

QUESTION PRESENTED

This suit was brought on a bond given to the Collector of Internal Revenue in connection with a deficiency in income and profits taxes which had been tentatively determined and assessed.

The condition of the bond is that it is of no effect if the principal or surety "shall pay to said Collector so much of the amount of the claim *as is not abated.*" (Italics supplied.)

After the bond was given, the United States Board of Tax Appeals, in a decision which has become final, held that there was "no deficiency" in respect of the tax. The reason for the decision as given in the opinion was the running of the Statute of Limitations on a date prior to the date the bond was given. The Board considered it unnecessary to pass on the issue involving the merits of the claim. The sole question in this case is whether the final decision of the Board that there was no deficiency "*abated*" the tax.

STATUTES INVOLVED

The appeal to the United States Board of Tax Appeals was taken pursuant to Sec. 283(e) of the Revenue Act of 1926. As the jurisdiction of the Board and the finality of its decision have never been questioned, this Section and Sections 274(a) and 1105, of the Revenue Act of 1926 bearing thereon, will not be set forth.

The question presented involves the construction of Section 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, and Section 274(b) of the Revenue Act of 1926. These Statutes are not referred to in the opinion of the Circuit Court of Appeals, and apparently have not been construed by any court.

Sec. 906(e) of the Revenue Act of 1924 as amended by Sec. 1000 of the Revenue Act of 1926 and Sec. 601 of the Revenue Act of 1928.

"If the assessment or collection of any tax is barred by any Statute of Limitations the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax."

Sec. 274(b) of the Revenue Act of 1926. "If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the Collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in Court with or without assessment."

The provisions of the Statutes which recognize the decision of the Board that there is no deficiency in respect of a tax assessed, as abating the tax, are Sections 279(a) and (b) of the Revenue

Act of 1924, Sec. 279(f) of the Revenue Act of 1926, and Sec. 273(f) of the Revenue Act of 1928. For the sake of brevity only the material portions will be set forth.

> "*Sec. 279(a)(b) Rev. Act 1924* (a) * * * Such claim shall be accompanied by a bond * * * conditioned upon the payment of so much of the amount of the claim as is not abated. * * *
>
> "(b) * * * If the claim is denied in whole or in part by the Commissioner (or the Board in case an appeal has been filed) the amount, the claim for which is denied, shall be collected as part of the tax upon notice and demand from the Collector, and the amount, the claim for which is allowed, shall be abated."
>
> "*Sec. 279(f) Rev. Act 1926, and Sec. 273(f) of the 1928 Act:* * * * the taxpayer * * * may obtain a stay of collection of the whole or any part of the amount of the asssesment by filing with the Collector a bond * * * conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final * * *."

STATEMENT

This action was brought by the United States in the District Court of the United States for the Southern Division of the Northern District of Alabama, to recover against Gulf States Steel

Company, as principal, and National Surety Company, as surety, on a bond given to the Collector of Internal Revenue for the District of Alabama on September 9, 1925, in connection with certain income and excess profits taxes for 1917, which the Collector of Internal Revenue claimed to be due from the Gulf States Steel Company.

Gulf States Steel Company filed its income and excess profits tax returns for the calendar year 1917 with the Collector of Internal Revenue for the District of Alabama on March 28, 1918, and on June 25, 1918, paid in full the amount of taxes in the total sum of $989,790.57, shown on said returns to be due.

Thereafter, the Commissioner of Internal Revenue examined said returns and tentatively determined a deficiency in the taxes reported of $153,815.30, and in April, 1921, assessed the amount of said tentative deficiency against Gulf States Steel Company. On May 6, 1921, Gulf States Steel Company filed a claim for the abatement of the full amount of this deficiency. On March 13, 1923, a surety bond was given to the Collector; on this bond Gulf States Steel Company was principal and American Surety Company was surety. On April 23, 1925, the individual bond of Gulf States Steel Company, for a larger sum than the first bond, in the form of an agreement under which Liberty Bonds were deposited as collateral, was filed. Thereafter, on September 9, 1925, to secure the release of the Liberty Bonds, Gulf States Steel Company, as principal, and National Surety Company, as surety, delivered to the Collector the bond on

which recovery was had, the condition of which was to pay "so much of the amount of the claim as is not abated." The Collector acquiesced in these substitutions.

On May 12, 1926, the Commissioner of Internal Revenue finally determined the deficiency in the amount assessed, and rejected the claim for abatement filed by Gulf States Steel Company. From this final determination, Gulf States Steel Company appealed by petition to the United States Board of Tax Appeals, to which jurisdiction in the premises duly appertained. In its petition on appeal (R.91) Gulf States Steel Company contended in substance that there was no liability for such taxes because (1) the Commissioner had refused to make a proper allowance for depletion (R.92 par. 4(a)); (2) the Commissioner had refused to allow the proper amount of invested capital (R.92 par. 4(c)). After the decision of this Court in *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, it amended its petition on appeal to set up a third contention, to wit, that (3) the Statute of Limitations upon the collection of the taxes had expired. (R.77 par. 4(d)).

The depletion question was settled by stipulation; evidence was introduced before the Board of Tax Appeals on the issues of invested capital and the Statute of Limitations.

Thereafter, on July 10, 1928, the Board of Tax Appeals handed down its decision that "there is no deficiency for the year 1917." *Gulf States Steel Company v. Commissioner*, 12 B. T. A. 1244, 1251. (R.59-66.) The reason for the decision

given in the opinion was the running of the Statute of Limitations on March 18, 1923, the Board saying in view of its decision: "It does not become necessary to consider the third issue relating to invested capital for 1917." On October 28, 1928, the Board entered its order of redetermination pursuant to this decision (R.58). On April 9, 1929, the Commissioner of Internal Revenue filed his petition for a review of the decision of the Board in the United States Circuit Court of Appeals for the Fifth Circuit. The review was dismissed by that Court upon the motion of the Commissioner on December 3, 1929. (R.45.)

In August, 1930, following the dismissal of the appeal to the Circuit Court, the Government instituted its action in the District Court to recover upon the bond given to the Collector on September 9, 1925. It is alleged in the plaintiffs' complaint (R.10-11) that the claim for abatement was rejected by the Commissioner on May 12, 1926, "whereby there remained unpaid and unabated" the full amount of taxes assessed as above set forth, and that the "finding and determination of the Commissioner of Internal Revenue rejecting said claim for abatement has remained and now is in full force, vigor and effect, unvacated, unreversed and unmodified." The defendants interposed their pleas, denying the above allegation and alleging the reversal of the Commissioner and the abatement of the taxes by the final decision of the United States Board of Tax Appeals. (R.24, 26.) On May 1, 1931, the Government demurred to these pleas. (R.28-29.) The

demurrers were sustained and the judgment was entered on May 1, 1931. (R.29.) Upon writ of error, the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit on February 19, 1932. (R.119.) Judge Sibley dissenting.

SPECIFICATION OF ERROR TO BE URGED

The error which petitioners urge as ground for reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit is:

That the Court erred in holding that the claim for the deficiency of taxes was not abated by the final decision of the United States Board of Tax Appeals that there was no deficiency.

ARGUMENT

I.

The claim for deficiency of taxes was abated and the bond became of no effect in accordance with its terms prior to the institution of this action.

This is an action upon a bond; it is not an action to collect taxes. As it is an action on a bond, the cause of action given by the bond is necessarily founded upon the language of the bond itself. Under that language the bond is of no effect if the petitioners have paid "so much of the amount of the claim as is not abated." The sole question then is, was the claim abated by the decision of the Board?

The word "abate" is not defined in the bond or in any of the Revenue Acts. The second and third

bonds (this suit being on the third bond) were given, however, after the enactment of the Revenue Act of 1924, and are in the exact language of that Act. (Sec. 279(a)) which characterizes as an abatement the decision of the Board that there is no deficiency in respect of a tax which has been assessed. The language of this section is substantially the same as that used in Sec. 279(f) of the Revenue Act of 1926 under which the appeal to the Board was decided.

The conclusion is reached in the majority opinion in the Circuit Court of Appeals that if the decision of the Board has been upon the merits the tax would have been abated, but this conclusion fails to take into account Sec. 906(e) of the Revenue Act of 1924, as amended by the Revenue Acts of 1926 and 1928, which specifically provides that a decision by the Board on the Statute of Limitations is equivalent to a decision on the merits, i.e., "that there is no deficiency in respect of such tax." The majority opinion makes no effort to explain why this Section should be ignored; why a decision on the merits in one case abates a tax and a decision on limitations, which Sec. 906(e) makes of the same effect as a decision on the merits, does not. Besides no mention being made of that section, the decision is based on a definition of abatement in two Massachusetts cases arising under the poor laws of that State over 100 years ago. That definition requires a cancellation of the tax on account of some defect in the original assessment. This position is effectively answered by Judge Sibley in his dissenting opinion when he points out:

"The point in that case was whether a pauper could claim support from a township as having theretofore *paid* five years' taxes when in fact some of them had been *forgiven* him. No question of abatement by limitation was involved. If it be true that in Massachusetts jurisprudence abatement refers only to error or mistake in assessment and not to remission of taxes, the contrary is true in the Federal jurisprudence.

"In R.S., g2984 and g3221, the Secretary of the Treasury was authorized in certain cases to remit taxes duly and properly assessed on imported merchandise or distilled liquors which were afterwards accidentally destroyed. In both sections the remission before payment, although not for an error in the assessment, is termed an abatement, and after payment a refund; and the Supreme Court uses the word 'abate' in that meaning in *United States v. Alexander,* 110 U. S. 325. A tax may therefore properly be said to be abated not only for errors and mistakes in its assessment, but for matters arising afterwards and before its collection."

It will be recalled that prior to the decision of this Court in *Bowers v. N. Y. & Albany Lighterage Co.*, 273 U. S. 346, limitations on collections by distraint was not recognized, and prior to the Revenue Act of 1924 when the Board of Tax Appeals was created, there was no procedure by which a taxpayer could contest liability for income taxes erroneously assessed by the Commis-

sioner except to pay the tax and proceed by claim for refund and suit thereon. *Graham v. Dupont*, 262 U. S. 234, 258. As taxes had to be paid before suit, the question of abatement rarely arose. The very Act which created the Board and set up the procedure for contesting a tax before payment characterized the power of the Board to disallow an assessment as an abatement, and that characterization is carried into all the later Acts. No provision is found in the first or subsequent Acts which limits the effect of the Board's decision in this respect to a decision based on an error in the original assessment. From December 23, 1924, when the Board handed down its decision in *Appeal of National Refining Company*, 1 B.T.A. 236, it has repeatedly exercised its jurisdiction to disallow deficiencies proposed or assessed, on the ground of the running of the Statute of Limitations.

Even if we did not have the Sections of the Acts cited above and the decision of this Court to which Judge Sibley refers as authority for the contention that the taxes were abated as a result of the Board's decision, and were forced to look to accepted definitions of the term "abate" we would point to Funk & Wagnall's New Standard Dictionary where this definition is found: "To remit all or part of, as a tax." The word "remit" is defined as "to refrain from exacting." Certainly, under Sections 906(e) of the Revenue Act of 1924 as amended by the 1926 Act, and 274(b) of the Revenue Act of 1926, the Government was required to and did refrain from exacting the taxes. It admits its cannot collect the taxes and

has no valid claim for the taxes. It disavows any intention of collecting taxes in this suit. It contends, however, that it has a right to recover the contractual amount of the bond. But the contract is to pay so much of the claim for the tax as is not abated. The claim for the tax has been abated and there is no liability on the bond.

It is immaterial that limitations was not one of the grounds in the abatement claim. The bond was not limited to the grounds therein stated and had all such grounds been conceded the assessment might have been sustained on other grounds when the final determination was made and no abatement would have resulted. As pointed out by Judge Sibley, it was proper to set up limitations as a ground of abatement at any time before the final decision of the Board, *Almeda Park Co. v. Lucas*, 37 Fed. (2nd) 805, and cases cited. And there was no impropriety in pleading it after the decision of this Court on February 21, 1927, in the *New York & Albany Lighterage Company* case, established its validity as a ground of abatement.

Furthermore, the Board in this case considered that its decision on limitations was of the same effect on the tax as a decision on the merits. Consequently, it held it was not necessary to consider the merits of the taxpayer's case. *When the Commissioner dismissed his own appeal from the Board's decision, the Board's decision became final and, if the judgment sought to be reviewed is sustained, the taxpayer was by the act of the Commissioner denied the opportunity which the Statute gives of ever having a determination of*

the merits of its case. Likewise, in many other cases a similar situation has arisen, resulting in a denial to taxpayers of decisions on the merits. As Judge Sibley points out, the majority opinion "forfeits the defense of limitation already accrued on giving the statutory bonds" required to be given by the Acts. For the future, as in the past, the situation will be that a taxpayer against whom an unjunst assessment has been made and who must file a bond to have his case heard before the payment of the tax, cannot plead the Statute of Limitations, while another taxpayer who has been given the right to appeal before the assessment has been made, may safely plead the statute.

II.

The decision of this court in the John Barth Company case, relied upon by the court below, is not in point.

The majority in the Court below held that the Government was entitled to recover upon the authority of this Court's decision in the Barth case, 279 U. S. 370. Judge Sibley, in his dissenting opinion, has pointed out that this case is not controlling. In addition to the points made by Judge Sibley, it is pertinent to observe that in the Barth case the Government sued the principal and surety on a bond which obligated the defendants to pay "on notice and demand by the Collector * * * any part of such tax found by the Commissioner to be due * * *." The defendants demurred to the complaint on the grounds that the Statute of Limitations had run on the collec-

tion of the tax. By the demurrer the defendants admitted the pleaded facts, that (1) the Collector had demanded payment, and (2) the tax had been "found by the Commissioner to be due." When these facts were established, the liability on the bond was established in accordance with its exact terms.

The defendants did not contend, as in this case, that the condition of the bond had been fulfilled, but sought to set up in an action on a contract to pay the tax, the Statute of Limitations on collection of the tax independent of any agreement to pay it. This Court permitted no collateral attack on the finding of the Commissioner, saying (page 375):

> "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit cannot be extended by implication to a suit upon a subsequent and substituted contract."

The petitioners in the instant case did not plead the Statute of Limitations, they pleaded the fact that the claim for the tax had been abated by the decision of the Board and the provisions of the contract exempting them from liability in this event.

Moreover, in the Barth case, the bond was given prior to the running of the Statute of Limitations. In the instant case, the bond on which this suit was brought was given more than two years after the Statute had run.

The surety on this bond was not a party to an obligation given before the running of the Statute, as in the Barth case. Its relations to the United States is, as pointed out by Judge Sibley, that of surety to another, and its obligation is one of strict law, measured solely by the bond it signed, fairly interpreted.

In addition, this Court said in the Barth case at page 375:

> "The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given."

In the case in the Board of Tax Appeals, the Government alleged the giving of the Bond (R.73) and urged that the Bond was a waiver of the Statute of Limitations and that the taxpayer was estopped to set up the running of the Statute as a ground of defeating the tax. On considering these contentions, and reviewing the circumstances under which the bonds were given, the Board said (R.65):

> "Under such circumstances, we cannot hold that there was an intent to waive the statute implied in the bonds when the expression of such an intent was lacking or that there had been established any basis for the application of the doctrine of estoppel."

The Board also held that as it had given one reason for its holding of no deficiency, it was idle to pass upon the question of invested capital. That decision could have been reviewed on appeal

and only on appeal. The appeal was dismissed. The decision has become final. It is not subject to collateral attack.

This proposition was clearly stated by the District Court in *United States v. Martin Hotel Company* (52 Fed. (2nd) 161, reversed by C.C.A. 8th Circuit, May 18, 1932). In that case, an escrow contract was given to secure payment of "taxes when and to the extent that they should finally be determined to be just and payable." The Board of Tax Appeals had held that there was no deficiency because of the running of the Statute of Limitations. The Court said at page 163:

> "Finding as I do under the Barth case, that the giving of the security by the taxpayers operated to postponed the time within which there could have been a determination of the assessments that would have bound the taxpayers upon their contract of security the action of the Board appears contrary to my understanding. The Board, as I see it, ought to have reviewed the assessments and so saved the rights of the government, if any. *But the Court of Appeals alone had jurisdiction to review the action of the Board. The Board and the Board alone had the power to decide whether or not upon a fair assessment there were any taxes due and it decided, for reasons sufficient to itself, that there were no excess taxes and so declared. I conclude therefore that the government is not entitled to recover anything herein on account of the promise in the contract to pay 1919 taxes.*" (Italics ours.)

To permit a collateral attack at this time on the decision of the Board would not only be contrary to the specific provisions of the Statute, under which the decision of the Board became final when the appeal to the Circuit Court was dismissed, but would deny to these defendants substantial rights. Had the Government prosecuted its appeal to the Circuit Court, and had the Court decided that the reason for the Board's decision was unsound under the Barth case, or on other grounds that Court would have sent the case back to the Board for a determination on the invested capital question.

The decision of the Circuit Court of Appeals in this case treats the action of the Board of Tax Appeals as not being a *disposition* of the appeal because of the reasons given for its decision.

Our contention is that the *action* of the Board of Tax Appeals on an appeal to it is analogous to the judgment of a court and is effective independently of the reasons for it. This position is fortified by the following from Section 907(a) of the Act of 1924 as amended by the Act of 1926, which was in force when the appeal was decided by the Board:

> "Whenever the Board deems it advisable the report shall contain an opinion in writing in addition to the finding of fact and *decision.*"

If the decision of the Circuit Court of Appeals remains unreversed by this Court, these defendants will have lost, through no fault of their own, all right to have determined their claim that no

additional tax liability ever existed, a right which the Statutes permitting the appeal to the Board gave to them.

Accepting the finding of this Court in the Barth case that "the making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes," it follows that the cause of action given by the bond depends upon the terms of the bond. Those terms obligate the petitioners to pay only so much of the claim as is not abated. As no part of the tax claimed remains unabated, there is nothing to be paid.

CONCLUSION

In view of the errors made by the Court below, it is respectfully submitted that the judgment below should be reversed.

JOHN M. PERRY
AUGUSTUS BENNERS
JOHN W. DRYE, JR.
Counsel for Petitioners.